No. 04-66

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

ABDELA TUM, *et al.*,

Petitioners,

v.

BARBER FOODS, INC.,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the First Circuit

BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES, NATIONAL ASSOCIATION OF MANUFACTURERS, SOCIETY FOR HUMAN RESOURCES MANAGEMENT, AND ASSOCIATION OF INTERNATIONAL AUTOMOBILE MANUFACTURERS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

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STATEMENT OF INTEREST

This brief *amici curiae* is being filed on behalf of the nation's leading business and human resources professional associations.[1]

The Chamber of Commerce of the United States of America ("the Chamber") is the world's largest business federation. It represents an underlying membership of more than three million businesses, state and local chambers of commerce, and professional organizations of every size, in every industry sector, and from every region of the country. The Chamber advocates the interests of the business community in courts across the nation by filing *amicus curiae* briefs in cases involving issues of national concern to American business. The Chamber has participated as *amicus curiae* in hundreds of cases before the United States Supreme Court and the federal Courts of Appeals, including numerous Fair Labor Standards Act ("FLSA") cases.

The National Association of Manufacturers ("NAM") is the nation's largest industrial trade association, representing small and large manufacturers in every industrial sector and in all 50 states. NAM's mission is to enhance the competitiveness of manufacturers by shaping a legislative and regulatory environment conducive to U.S. economic growth and to increase understanding among policymakers, the media and the general public about the vital role of manufacturing to America's economic future and living standards.

The Society for Human Resources Management ("SHRM") is the world's largest professional association devoted to human resources management, representing more than 190,000 individual members. Its members possess

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[1] No counsel of any party authored any part of this brief, and no person or entity, other than the *amici curiae*, their members, and their counsel, made a monetary contribution to the preparation and submission of this brief. Both parties have granted consent to the filing of this brief. Letters of consent are on file with the Clerk of the Court.

expertise in administering employee wage and benefit programs, and in designing or evaluating compensation policies to achieve high employee productivity and retention.

The Association of International Automobile Manufacturers ("AIAM") is a trade association representing fourteen international motor vehicle manufacturers who account for forty percent of all passenger cars and twenty percent of all light trucks sold annually in the United States. AIAM companies have invested nearly $28 billion in U.S.-based production facilities, have a combined domestic production capacity of 3.4 million vehicles, directly employ 93,000 Americans, and generate well over 1 million U.S. jobs in dealerships and supplier industries nationwide. AIAM's mission is to protect and promote the unique interests of the U.S. subsidiaries of international automakers and their suppliers in the United States.

The *amici* organizations ("*amici*") agree that all employers must comply with the duties imposed by the FLSA to compensate workers for all hours worked. However, FLSA lawsuits increasingly claim compensation for activities excluded from compensation under the FLSA, seeking windfall compensation for pre- and post-shift activities that often promote employee convenience and are difficult for employers to monitor.

The plaintiffs in the cases under review, *Tum v. Barber Foods, Inc.*, 360 F.3d 274 (1st Cir. 2004) (No. 04-66), and *Alvarez* v. *IBP, Inc.*, 339 F.3d 894 (9th Cir. 2003) (No. 03-1238), ask this Court to expand the scope of the preliminary and postliminary activities for which employers can be forced to pay. The employer community is concerned such an expansion will spur a tide of hours-worked litigation with wide-ranging repercussions for the U.S. economy, as employers design their physical plants not to maximize efficiency or morale, but rather principally to avert FLSA lawsuits by minimizing pre- or post-shift walking or waiting time of their employees.

Because the employees' position disregards the limits on FLSA compensability put in place by the 1947 amendments to the FLSA, commonly known as the Portal-to-Portal Act, *amici* have filed this brief in support of Respondent Barber Foods, Inc. in No. 04-66.

SUMMARY OF ARGUMENT

Section 4 of the Portal-to-Portal Act, 29 U.S.C. § 254(a) ("the Portal Act"), provides that an employer has no duty to compensate an employee for time spent traveling or performing preliminary/postliminary activities, prior to the commencement of, or after the cessation of, the "principal ... activities which such employee is employed to perform ...." The work the employees in this case are employed to perform is meat processing; any activities occurring before the beginning or after the end of their regular shifts are generally not compensable under the Act. Subsequent to the Portal Act, a decision of this Court, *Steiner v. Mitchell*, 350 U.S. 247 (1956), carved a narrow exception into this general rule, allowing for compensability of donning and doffing of required safety equipment—activities found "integral and indispensable" to the principal activity. *Steiner* did not hold, however, that such donning and doffing are themselves principal activities such that tasks performed after their commencement and prior to their cessation for that reason become compensable.

The Court of Appeals below properly rejected the argument advanced by Petitioners, and embraced by the Ninth Circuit in *Alvarez v. IBP, Inc.*, 339 F.3d 894 (9th Cir. 2003), which would eviscerate the two central provisions of the Portal Act. Those provisions are: Section 4(a), 29 U.S.C. § 254(a), which establishes a clear rule of non-compensability for preliminary and postliminary activities; and Section 4(b), 29 U.S.C. § 254(b), which allows employers and employees to contract around this default rule in appropriate circumstances. If all time spent between donning and doffing were deemed compensable, there would

be little occasion for private bargaining—though there would be plenty of litigation, reminiscent both in form and magnitude of the torrent of cases that descended upon the federal courts after this Court's decision in *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680 (1946). As the First Circuit ruled below, this outcome is not required by either the statute or the Secretary of Labor's interpretive regulations.

ARGUMENT

I. UNDER THE PORTAL ACT, PRELIMINARY AND POSTLIMINARY ACTIVITIES SUCH AS WALKING AND WAITING ARE NON-COMPENSABLE

A. Walking And Waiting Time Are Exempt From Compensation Because Such Activity Occurs Before Or After The Principal Activities Which Petitioners Are "Employed To Perform"

Section 4(a) of the Portal Act, 29 U.S.C. § 254(a), states that "no employer shall be subject to any liability or punishment" for failure to compensate employees for any of the following activities:

> (1) walking, riding, or traveling to and from the actual place of performance of the principal activity or activities which such employee is employed to perform, and
>
> (2) activities which are preliminary to or postliminary to said principal activity or activities,
>
> which occur either prior to the time on any particular workday at which such employee commences, or subsequent to the time on any particular workday at which he ceases, such principal activity or activities.

This language plainly controls the outcome of both cases before the Court. The employees in both *Tum* and *Alvarez* are "employed to perform" the activities of processing or slaughtering meat, and so for purposes of § 254(a), those activities are the "principal activities." Time spent on

preliminary/postliminary activities or walking to or from the "actual place of performance of the principal activity" (*i.e.*, the employee's station on the meat-cutting line) is not compensable if it occurs "prior to the time on any particular workday at which such employee commences, or subsequent to the time on any particular workday at which he ceases, such principal activity or activities." Since it is undisputed that all of the walking and waiting time at issue here occurs either before the processing of the first piece of meat or after the processing of the last piece, the walking and waiting time is simply not compensable under the Portal Act.

Congress specifically sought in Section 4(a)(1) of the Portal Act to exclude time spent walking or otherwise traveling "to and from the actual place of performance of the principal activity" from compensation, whether or not such time also can be excluded under Section 4(a)(2) as "preliminary or postliminary to said principal activity." The reason for this explicit exclusion of walking-traveling time was to overturn a series of Supreme Court decisions[2] that had read into the pre-1949 law a requirement of compensation of all time spent reaching "the actual place of performance," whether it be the work face of the mine, a place on the assembly line, or a position on the slaughtering line. This exclusion of walking-traveling time obtains even before Section 4(a)(2) is considered. As the Court noted in *Steiner*, its analysis of Section 4(a)(2) does not apply to pre- and post-shift activities that are "specifically excluded by Section 4(a)(1)." 350 U.S. at 256.

Petitioners nevertheless invoke the "continuous workday rule" outlined in the U.S. Department of Labor's Interpretative Bulletin 13 (1939), arguing that the *Tum* court impermissibly "interprets the Portal Act to create a markedly

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[2] *See Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680 (1946); *Jewell Ridge Coal Corp. v. United Mine Workers of Am., Local No. 6167*, 325 U.S. 161 (1945); *Tennessee Coal, Iron & R.R. Co. v. Muscoda Local 123*, 321 U.S. 590 (1944).

discontinuous workday" (Pet. Br. at 24). But the continuous workday rule cannot carry the weight that Petitioners would place on it, because the First Circuit's ruling is fully consonant with its central tenet: a workday (as defined by the start and finish of the activities the employees are "employed to perform") is continuous, *once it begins*. There is no rule that also establishes the converse proposition that Petitioners urge, that all compensable time must occur during the "workday."[3] Under *Steiner*, rather, there are a few activities preceding or following the workday that happen to be compensable, notwithstanding the fact that they occur before or after the "principal activities the employee is employed to perform." Compensating those activities does not require the workday to "start," nor does the workday "stop" simply because subsequent walking or waiting time is not compensated.

In short, the only test for compensability under the Portal Act is whether the activity takes place before, during, or after "the principal activities an employee is employed to perform." There is no basis for arguing that Congress intended the compensability of all other tasks during the day to turn on whether an initial preliminary activity happens to be compensable.

B. This Court's Decision In *Steiner* Holds Only That Donning And Doffing Of Required Safety Equipment Are Compensable, Not That They Are Principal Activities In All Respects

Steiner's holding is a narrow one: it merely carves out an exception to the Portal Act for a limited class of preliminary/postliminary activities deemed in that opinion to

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[3] In fact, Interpretive Bulletin 13 expressly contemplates compensation outside the bounds of the workday. *See* Interpretive Bulletin 13, ¶ 8 ("in some cases employees may be subject to call after the completion of their regular working day" and while the employees must be compensated for time spent answering the call, in some circumstances the intervening time "need not ordinarily be considered hours worked").

be "integral and indispensable" to a principal activity. Relying on the legislative history, the Court held that the donning and doffing of protective clothing were "integral and indispensable" to the "direct or productive labor" for which the battery plant workers in that case were "primarily paid," *Steiner*, 350 U.S. at 248—*i.e.*, the work they were "employed to perform." The donning and doffing were considered compensable activities notwithstanding the text of the Portal Act.

The Court did not alter the Portal Act's basic § 4(a) definition of an employee's "principal activity or activities" as the "activity or activities ... such employee is employed to perform." Such an extension would have ignored the very same Senate committee report the Court relied upon, which evinces a clear Congressional intent *not* to compensate time spent walking to and from the employee's workstation, regardless of the relation in time of that walk to activities that might be thought to commence a "workday." In the words of the Senate Judiciary Committee

> [t]he following activities outside the workday are among those not to be considered compensable under the Fair Labor Standards Act . . . : [w]alking, riding, or traveling to and from the actual place of performance of the principal activity or activities within the employer's plant . . . irrespective of whether such walking, riding, or traveling occur on or off the premises of the employer or *before or after the employee has checked in or out.*

S. Rep. No. 80-48, 1st Sess., at 47 (1947) ("Senate Report") (emphasis added).[4]

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[4] While not entirely identical situations, checking in and out closely parallel the preliminary/postliminary activities at issue here. In this passage, checking in and out serve as rough measures of the beginning or the end of the workday, just as Petitioners claim that donning and doffing bookend their workday. The point of the passage, however, is that the time clock is not a relevant measure under the Portal Act; walking time was not to be compensable regardless of its relation to the start or end of

In addition to their "continuous workday" contention, Petitioners assert that the walking and waiting time at issue in this case are themselves compensable under *Steiner* as "integral and indispensable" parts of their primary activities, regardless of when the workday is thought to begin. Pet. Br. at 36-38. But *Steiner* is limited on its own terms to the compensability of preliminary or postliminary activities as defined by § 4(a)(2)[5]; it did not purport to decide, nor did it address, the compensability of the "walking, riding or traveling" exempted from compensation by § 4(a)(1). The question in *Steiner* was simply whether FLSA compensation was owed for the particular activity of "chang[ing] clothes and shower[ing] in facilities which State law requires the[] employer to provide"; according to the record before the Court, the time spent "in clothes changing and showering . . . was found to amount to thirty minutes a day."[6] Moreover, the opinion relied heavily on legislative history indicating that Congress specifically intended integral and indispensable clothes-changing activities to be compensable—in marked contrast to the treatment accorded to time spent "walking, traveling, [and] riding," which Congress "clearly eliminated from compensation."[7]

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the "workday," if that time occurred before the commencement or after the cessation of the principal activity. The same is true of walking that takes place after donning or before doffing; it is not compensable—whether or not the "workday" in some colloquial sense has started.

[5] *See Steiner*, 350 U.S. at 248 (formulating question presented as "whether workers in a battery plant must be paid as a part of their 'principal' activities for the time incident to changing clothes at the beginning of the shift . . . or whether these activities are 'preliminary' or 'postliminary' within the meaning of the Portal-to-Portal Act.")

[6] Br. for Respondent, *Steiner v. Mitchell*, No. 22, O.T., 1955, at 7.

[7] 29 C.F.R. § 790.7(d) n.47 (quoting statements of Senator Cooper on March 20, 1947, 93 Cong. Rec. 2299); *see also* Senate Report at 47 (noting that "[w]alking, riding, or traveling to and from the actual place of performance of the principal activity" belongs to a category of activities that are "not to be considered compensable under the Fair Labor Standards Act").

Nor did *Steiner* purport to overturn *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944), which remains the leading decision of this Court as to the compensability of waiting time. It is undisputed that the Portal Act does not render compensable any activity that was previously non-compensable.[8] Thus, the compensability of waiting time remains unaffected by *Steiner* and is controlled by the Court's test in *Skidmore* as to whether the "[f]acts . . . show that the employee was engaged to wait, or they . . .show that he waited to be engaged." *Skidmore*, 344 U.S. at 137. Petitioners have not established a case for the compensability of waiting time within the strictures of *Skidmore*.[9]

Petitioners thus do not advance any independent argument as to the compensability of the waiting time in this case. Rather, they seem to suggest that *Steiner* overturned *Skidmore sub silentio* by establishing a test for judging the compensability of waiting time other than the "engaged to wait"/"waiting to be engaged" test—namely, the "integral and indispensable" test applied by Petitioners on pages 37-39 of their brief. But *Steiner* could not have so held, as the compensability of waiting time was not an issue before the Court. Petitioners' analysis should therefore be rejected in its entirety.

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[8] The plain text of § 4(a) establishes certain categories of labor for which employers shall be relieved of "any liability or punishment" under the FLSA. For activities that do not fall within these categories, the "liabilities and obligations under the Fair Labor Standards Act . . .are not changed in any way by section 4 of the Portal Act." 29 C.F.R. § 790.8(a). In other words, the Portal Act created new exemptions from liability but no new obligations to pay wages.

[9] On the facts of this case, Petitioners make no effort to demonstrate that their wait results from any factor other than "the number of employees involved," in which case the wait is not compensable. *See Vega ex rel. Trevino v. Gasper*, 36 F.3d 417, 427 (5th Cir. 1994) (citing D.O.L. Opinion Letter WH-533 (Dec. 16, 1991)).

C. The Structure Of The Portal Act Makes Clear That Congress Intended Preliminary And Postliminary Activities To Be Compensated By Means Of Private Agreements

The interpretation of Section 4(a) advanced above also finds support in the interrelationship of Sections 4(a) and 4(b) that together implement a policy favoring private agreements or industry customs over judicial fiat as the means for determining compensation for pre- or post-shift activities. The Portal Act, after all, does not prohibit their compensation. Rather, subsection (a) provides that these activities are non-compensable *ab initio*, and subsection (b) provides that they can be made compensable by contract or custom.[10] Together, these provisions allow the directly affected parties to reach a mix of compensation and non-compensation suitable for each employment context.

Private bargaining, as contemplated by § 4(b), can only occur if the parties start from a position of non-compensability.[11] An activity is removed from the scope of private bargaining if a court finds it compensable. This is true both for the FLSA in general, *Brooklyn Sav. Bank v. O'Neil*, 324 U.S. 697, 707 (1945) (noting "policy considerations which forbid waiver of basic minimum and overtime wages under the Act"), and rights to compensation

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[10] In addition, § 4(d) of the Act, 29 U.S.C. § 254(d), provides maximum flexibility to such contracts or customs by allowing the parties to agree to compensate portions of preliminary or postliminary activities while leaving others uncompensated. *See, e.g.*, 29 C.F.R. § 790.5(b) (providing an example of the potential application of § 254(d)).

[11] Specifically, 29 U.S.C. § 254(b) provides that "[n]otwithstanding the provisions of subsection (a) ... which *relieve an employer from liability* and punishment with respect to any activity, the *employer shall not be so relieved if such activity is compensable by either* . . . an express provision of a written or nonwritten contract . . . [or] a custom or practice in effect" (emphasis added). The statute confers no authority to relieve an employer from liability if the employer is not so relieved under subsection (a).

under *Steiner* or the industry custom provisions of § 4(b), *see Barrentine v. Arkansas-Best Freight System*, 450 U.S. 728, 732 n.7, 740-41 (1981) (emphasizing that FLSA rights, including rights to customary compensation for preliminary activities under § 254(b), cannot be "abridged by contract"). In other words, the Portal Act's bargaining policy works only in one direction: it encourages private parties to negotiate as to the compensability of non-compensable activities, but not vice versa.

Petitioners' interpretation would frustrate this Congressional policy because of the across-the-board manner by which it would render activities compensable and therefore non-negotiable. Compensability would unalterably depend on when an activity occurs in relation to certain other activities. A judicial decision finding compensable an initial preliminary activity and/or a final postliminary activity (*e.g.*, donning and doffing) would foreclose negotiations for all associated activities. Their compensability would be determined by inflexible, formalistic rules rather than factors relevant to the employment relationship.[12]

Congress enacted the Portal Act in response to a series of this Court's decisions, most notably *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680 (1946), that burdened employers with unexpected FLSA liabilities and unraveled established compensation patterns in many industries. As Section 1 of the Portal Act, 29 U.S.C. § 251, observes:

> The Congress finds that the Fair Labor Standards Act of 1938, as amended, has been interpreted judicially in disregard of long-established customs, practices, and contracts between employers and employees, thereby creating wholly unexpected liabilities, immense in amount and retroactive in operation.

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[12] For instance, the nature of the activity, how easily it can be monitored, how compensability would relate to other compensation provisions, and tradeoffs between compensation and improved working conditions.

The legislative solution was to insulate compensability decisions from the courts and leave them to be worked out privately by the parties themselves. This had been Justice Burton's desired approach in his *Mt. Clemens* dissent,[13] quoted with approval by the Senate Judiciary Committee. *See* Senate Report at 11 (quoting Justice Burton's dissent at length); *id.* at 45, 49 (noting that Section 4 "also provides that no judicial or administrative interpretation of the Fair Labor Standards Act ... shall have the effect of changing any written or nonwritten contract between the employer and employee ... to make compensable any portal-to-portal activities").

Contrary to Petitioners' suggestion, Pet. Br. at 31, the fact that Congress, in § 2 of the Portal Act, sought to eradicate the retroactive mischief wrought by *Mt. Clemens* does not imply that Congress was indifferent to the prospective effect of its legislation on private bargaining. Indeed, two years after the Portal Act, Congress further encouraged private bargaining when it added section 3(o) to the FLSA, which provides affirmative (though limited) authority for parties to a collective bargaining agreement to agree to exclude otherwise compensable donning and doffing from the computation of "hours worked."[14]

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[13] *See Mt. Clemens*, 328 U.S. at 697 (Burton, J., dissenting) ("While conditions vary widely and there may be cases where time records of 'preliminary activities' or 'walking time' may be appropriate, yet here we have a case where the obvious, long-established and simple way to compensate an employee for such activities is to recognize those activities in the rate of pay for the particular job. These items are appropriate for consideration in collective bargaining").

[14] 29 U.S.C. § 203(o) establishes that "In determining . . . the hours for which an employee is employed, there shall be excluded any time spent in changing clothes or washing ... which was excluded from measured working time during the week involved by the express terms of or by custom or practice under a bona fide collective-bargaining agreement ...."

In any event, Petitioners' proposed extension of *Steiner* plainly contravenes Congressional intent, since it subverts private bargaining *and* magnifies the retroactive effects of judicial rulings. The Portal Act would no longer function as a shield to protect private arrangements from judicial interference; it would become an instrument plaintiffs can use to secure windfall benefits from the courts. A finding that an initial preliminary activity was "integral and indispensable" would render a potentially much larger swath of time compensable on a retroactive basis, thus making it more difficult for employers to implement business plans. Petitioners thus would turn the Portal Act's goals squarely on their head; instead of encouraging private negotiation and discouraging retroactive liabilities, it would make it more difficult for settled contractual bargains to be enforced.

D. A Rule Of Compensability Here Would Result In Incongruous Treatment Of Similar Situations

A ruling in favor of compensability of post-donning waiting and walking time would also create compensation scenarios that run contrary to common sense and could not have been the intended result of either the Portal Act or *Steiner*. As an illustration, consider two employees who work at adjacent workstations, each a ten minute walk from the plant gate—a walk that is plainly not compensable, *see* 29 C.F.R. § 790.7(f). However, if one of the employees is required to stop at a changing station two minutes from the plant gate and don certain required safety gear, then this employee will gain the windfall benefit of an additional eight minutes of compensation for the remainder of his or her walk to the workstation—the exact same walk that remains non-compensable for the employee who wears no safety gear. If the changing station were located eight minutes from the plant gate, the windfall would shrink to two minutes of walking time. This makes no sense. While *Steiner*'s holding that the donning time is compensable seems sound, there is no reason that the mere act of donning safety gear should

transform an otherwise non-compensable walk into compensable activity.

Of course, not all changing stations are conveniently placed directly along the route from plant gate to workstation; in many plants, the location of the changing station may increase the employees' overall walking time. But this consideration simply reinforces Congress' wisdom in leaving any related compensation issues to private bargaining to the greatest extent possible. In a plant where the changing station is conveniently located near employee workstations, the parties may agree not to compensate the walk from changing station to workstation; in plants where the changing station is located further away, the parties might agree to compensate some or all of that walking time. But a rule that walking time is always compensable would frustrate the ability of employers and employees to reach sensible and equitable compensation arrangements.[15]

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[15] Such a rule could also compromise the operational efficiency of the plant or factory. For instance, using the example above, it may be considerably cheaper for the changing station to be placed eight minutes from the employees' workstations rather than two minutes away. If the employees are largely indifferent to that location, since they have a ten-minute uncompensated walk regardless of the location of the changing station, it would clearly be in the interests of the entire enterprise for the employer to position the changing station at the cost-minimizing location. However, under a legal rule in which employers must compensate employees for all walking that occurs after changing, even if the employees would face the same walk in the absence of changing, the employer would have a strong incentive to locate the changing station as close as possible to the workstations, even if that location creates additional costs for the enterprise that ultimately will detract from the resources available for the compensation of work.

II. THE DEPARTMENT OF LABOR'S INTERPRETIVE REGULATIONS DO NOT SUPPORT PETITIONERS' ARGUMENT

A. The Secretary's Regulations Are Not Due *Chevron* Deference

The Government devotes a sizeable portion of its brief to the propositions that the Department of Labor regulations and the Secretary's subsequent interpretation of those regulations are "entitled to deference." U.S. Br. at 16, 21. The government cites *Barnhart v. Walton*, 535 U.S. 212, 221 (2002)—an inapposite case involving substantive regulations of the Social Security Administration, promulgated after notice-and-comment procedures, *see id.* at 217, and pertaining to its task of administering a large benefits program. To the extent that *Barnhart* can be read to support the Government's proposition that informal rules may qualify for *Chevron* deference, it is limited to regulations incident to the administration of a federal program; *see id.* at 221-22 (observing that the "'power of an administrative agency to administer a congressionally created . . . program necessarily requires the formulation of policy'") (quoting *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843 (1984)). In the FLSA context, however, the Secretary of Labor does not oversee a benefits program and has no administrative responsibilities analogous to those at issue in *Barnhart*.

The general rule for *Chevron* deference is stated in *United States v. Mead Corp.*, 533 U.S. 218, 226 (2001): "administrative implementation of a particular statutory provision qualifies for *Chevron* deference when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law." The Secretary's regulations cannot meet this test since she does not possess the authority to engage in legislative rule-making for the Portal Act. In the FLSA context, Congress has typically delegated, by means of explicit statutory command, such

authority for particular issues only. *See, e.g.*, 29 U.S.C. 213(a)(1) (calling for "regulations of the Secretary" to "define[] and delimit[]" the terms "bona fide executive, administrative, or professional capacity."). No such delegation exists anywhere in the Portal Act. Nor can it be gleaned from "other statutory circumstances" that "Congress would expect the agency to be able to speak with the force of law when it addresses ambiguity in the statute," *Mead*, 533 U.S. at 229, since the Portal Act delegated no authority to the Secretary. To the contrary, the statutory text addresses a number of highly detailed issues that might, in other situations, be left to an agency.[16]

The Secretary has evidently recognized this lack of authority to promulgate legislative rules for the Portal Act, since the Portal Act regulations are contained in Subchapter B of the Wage and Hour Division Regulations, entitled "Statements of General Policy or Interpretation Not Directly Related to Regulations." 29 C.F.R. §§ 775.0-794.144. These "advisory interpretations" "serve only to indicate the construction of the law which will guide the Administrator in the performance of his administrative duties . . . unless he shall subsequently decide that his prior interpretation is incorrect." 29 C.F.R. § 775.1. In other words, they are statements of general policies, not interpretations to which the courts owe *Chevron* deference. *See Christensen v. Harris Cty.*, 529 U.S. 576, 587 (2000) (holding that "[i]nterpretations such as those in opinion letters—like interpretations contained in policy statements, agency

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[16] *See, e.g.*, 29 U.S.C. § 254(d) (instructing that "in determining the time for which an employer employs an employee with respect to walking, riding, traveling, or other preliminary or postliminary activities . . . there shall be counted all that time, but only that time, during which the employee engages in any such activity which is compensable within the meaning of subsections (b) and (c) of this section"); 29 U.S.C. § 256 (setting forth a detailed methodology for determining the date of commencement of future actions).

manuals, and enforcement guidelines, all of which lack the force of law—do not warrant *Chevron*-style deference").[17]

B. In Any Event, The Regulations Do Not Indicate Compensability For The Walking And Waiting Time In This Case

Both the Government and Petitioners rely heavily on the Secretary's regulations to bolster their case. Admittedly, at first glance, two provisions may appear helpful to Petitioners' cause: 29 C.F.R. § 790.6(a) says that "[p]eriods of time between the commencement of the employee's first principal activity and the completion of his last principal activity on any workday must be included in the computation of hours worked to the same extent as would be required if the Portal Act had not been enacted"; and 29 C.F.R. § 790.8(b) provides that "[t]he term 'principal activities' includes all activities which are an integral part of a principal activity." A reading of these statements that ignores the surrounding context might support Petitioners' contentions, but when viewed in light of other statements in the same interpretative regulations, these provisions are best read as endorsing the opinion of the First Circuit below and the Portal Act interpretation advanced in Point I.A above.

Consider, for instance, 29 C.F.R. § 790.7(d), which provides that a logger should be compensated for time spent walking to his cutting spot if he must carry heavy power tools during the walk, but not compensated for the walk if he carries ordinary hand tools. In the first case, the walking "is not segreable from the simultaneous performance of his assigned work (the carrying of the equipment, etc.)," *id.*; in the second case, though, his walking time would be non-

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[17] Moreover, *Chevron* deference would be inappropriate because the statutory text is clear. *See General Dynamics Land Sys. v. Cline*, 540 U.S. 581, 600 (2004) (deference appropriate "only when the devices of judicial construction have been tried and found to yield no clear sense of congressional intent").

compensable no matter how "integral and indispensable" was the prior time spent gathering hand tools.

Indeed, the position advanced by Petitioners that the performance of compensable preliminary activities commences a period of continuous paid work time is squarely contradicted by the explicit advice offered by 29 § C.F.R. § 790.7(g) n.49 that:

> Washing up after work, like the changing of clothes, may in certain situations be so directly related to the specific work the employee is employed to perform that it would be regarded as an integral part of the employee's "principal activity."... This does not necessarily mean, however, that *travel between the washroom or clothes-changing place and the actual place of performance* of the specific work the employee is employed to perform, would be excluded from the type of travel to which section 4(a) refers. (emphasis added).[18]

Petitioners acknowledge that this footnote indicates that the regulations "take no position regarding the circumstances under which travel between a washroom or clothes-changing place and the place of performance of a principal activity" would be compensable. Pet. Br. 34. The Government calls the provision "ambiguous." U.S. Br. at 20. In other words, Petitioners and the Government effectively concede that the regulations do not support the specific arguments they make before the Court.

In any event, the regulations cannot be interpreted to support Petitioners' position without rendering § 4(a) of the Portal Act a virtual nullity. If, for instance, the acts of

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[18] Indeed, far from obscuring the distinction between principal and preliminary/postliminary activities, the regulations reinforce it. The reference above to "travel between the washroom or clothes-changing place and the actual place of performance of the specific work the employee is employed to perform" indicates that the changing of clothes, even where it is deemed an "integral part" of an employee's principal activity, is still not the *work that the employee is employed to perform.*

donning and doffing—as indispensable parts of the normal principal activities—were themselves principal activities, as suggested by § 790.8(b), then any activity that was an integral and indispensable part of donning and doffing could itself become a principal activity, and so on.[19] Furthermore, performance of a single "integral and indispensable" preliminary activity before a long morning commute could, under Petitioners' interpretation, render compensable the entire commute, from portal to portal.[20] The distinction so central to the statute would become blurred beyond recognition—a state of affairs that no interpretative regulation could tolerably bring about.

The First Circuit below recognized this implication of Petitioners' argument, noting the "absurd result that an employee who dons required equipment supplied by the company at 5:00 a.m., at his own home, starts his workday for FLSA purposes at 5:00 a.m." *Tum*, 360 F.3d at 281. The Government now seeks to distance itself from this logic by drawing a line between donning and doffing performed on the employer's premises and all other donning and doffing, with only the former being compensable. U.S. Br. at 23 (citing 29 C.F.R. § 790.8(c) n.65 ("Note 65")).

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[19] *See, e.g., Reich v. New York City Transit Auth.*, 45 F.3d 646, 651 (2d Cir. 1995) (rejecting claim that performance of a compensable preliminary activity renders subsequent commuting time compensable, because this logic would "justify [compensability] for 24 hours a day").

[20] *See, e.g., Boudreaux v. BanTec*, 2005 U.S. Dist. LEXIS 3323 (E.D. La. Feb. 22, 2005), in which plaintiff computer-repair technicians sought compensation for travel to and from their homes, on the theory that their performance at home of a number of preliminary "administrative duties" such as the required reading of work-related email rendered the subsequent commute compensable. The district court declined to grant summary judgment to the defendants "due to the lack of supporting legal precedent." *Id.* at *14. *See also Dooley v. Liberty Mut. Ins. Co.*, 307 F. Supp. 2d 234, 243 (D. Mass. 2004) (holding commuting time to be compensable when employees were required to check email and voice mail, prepare computers for use, and return telephone calls before beginning their commute).

The Government's position here is based on the premise, offered in its brief but not explicit in the cited portion of the agency's interpretive regulations, that off-site activity is non-compensable because "employer control is an important factor in determining whether an activity is an integral and indispensable part of an employee's principal activities." U.S. Br. at 24. However, employer control is a necessary but not sufficient condition of compensability under the Portal Act.[21] Indeed, the Government would read § 4(a)(2) right out of the statute, since an employee's time is typically not even counted as work unless it is under the employer's control. *See* 29 C.F.R. § 785.15 (observing that time that "belongs to and is controlled by the employer" qualifies as compensable work). If that same control prevented an activity from being considered preliminary or postliminary, then there would be no activities rendered non-compensable by § 4(a)(2); the only activities that remain non-compensable under the Government's interpretation would be non-work that was not compensable even before the Portal Act.

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[21] The Secretary's regulations acknowledge that employer control cannot be determinative of Portal Act compensability. For instance, travel time from work gate to work station is non-compensable, regardless of whether the travel is controlled by or even provided by the employer. *See* 29 C.F.R. § 790.7(f) (noting that time spent "riding on buses between a town and an outlying mine or factory where the employee is employed" and "riding on buses or trains from a logging camp to a particular site at which the logging operations are actually being conducted" is not compensable even if under the employer's control) (footnote omitted).

CONCLUSION

For all of the reasons above, *amici* organizations respectfully urge the Court reverse the judgment of the Ninth Circuit in *Alvarez*, and affirm the First Circuit in *Tum*.

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